SUGGESTIONS IN SUPPORT OF MOTION FOR REHEARING.

The Court of Appeals, in its opinion, stated (79):

> "The trial court rested its dismissal or summary judgment-order on the ground that the insured's right to seek reformation was *res judicata.*"

The Circuit Court of Appeals thereupon gave effect to the legal application of the doctrine of *res judicata* by the District Court by affirming it. Both decisions therefore conflict with the decisions of this Court in *Northern Assurance Co.* v. *Grandview Building Association,* 203 U. S. 106, and the decision of the Circuit Court of Appeals for the Sixth Circuit in *Leithauser* v. *Hartford Fire Ins. Co.,* 124 Fed. (2d) 117. In that case the Court of Appeals for said circuit held that, notwithstanding its own decision in the same entitled case, 78 Fed. (2d) 320, in an action at law on the policy, had affirmed the judgment of the district court denying a recovery thereon, wherein the insured sought to introduce evidence of an agreement that both parties agreed that they waived a provision of the policy forbidding insurance if the property insured was not owned by the insured but was merely leased. The policy contained a provision on that subject similar to provision 2 of the policy here involved incorporated in the opinion of the Court of Appeals.

At the trial of the action at law the insured did exactly as did petitioner herein, to-wit: he sought to prove that before the issuance of the policy the insurance agent was fully advised of the fact that the insured was not the owner but a lessee and agreed to waive said provision. The following excerpts from both opinions correctly state

the law, which both lower courts herein should have applied to the issues. In *Leithauser* v. *Hartford Fire Ins. Co.*, 78 Fed. (2d) 320, it was held that:

> "Insured cannot incorporate into policy by parol series of unrelated documents to effect change in policy's terms." (Syl. 2.)

> "Insurer's acceptance of premiums on fire policy after being advised by agent's report that building stood upon leased ground held not waiver of provision avoiding policy if insured did not own property in fee simple, where policy also provided that terms thereof should not be waived except in writing upon policy or attached thereto." (Syl. 3.)

This Court denied certiorari in 296 U. S. 645, wherein a review was sought of the judgment in said action at law against the insured.

Thereafter in a new suit for reformation (124 Fed. (2d) 117) the same court permitted reformation of the policy. The petition there prayed that the court include therein the words:

> "'It is agreed and understood, anything in this policy to the contrary notwithstanding, that the property insured by this policy is located on ground not owned by the insured in fee simple,' or words of like import."

In reversing the judgment denying the prayer the court, discussing *Northern Assurance Co.* v. *Grandview Building Ass'n*, 203 U. S. 106, said:

> "The court expressly ruled that the former decision was not an adjudication that the policy could not be reformed, saying: 'It was rendered in an action at law and only decided that the contract could

not be recovered on as it stood, or be helped out by any doctrine of the common law.' This is enough to say on the question of *res judicata*.

"The judgment in the first Leithauser suit was not conclusive of the second. While the parties were the same in each case, the causes of action were not."

As to election the court said:

"Leithauser did not select, in the first case, one of two inconsistent remedies. He tried to incorporate into the policy the same daily report and related matter used later as the basis for reformation. Our decision in effect was that this procedure offered him no remedy at all. He undoubtedly thought that it was a remedy, but when he was confronted with the judicial determination that it was not, there is nothing in the law of election to bar him from pursuing the right one."

This Court denied certiorari in 316 U. S. 663, wherein the judgment granting reformation was sought to be reviewed.

So that it appears that the judgment of the Circuit Court of Appeals herein, approving and affirming the judgment of the District Court on the ground of *res judicata* is in conflict, not only with the decision of this Court in *Great Northern Assurance Co.* v. *Grandview Building Ass'n*, 203 U. S. 106, and *Baumhoff* v. *Railway*, 205 Mo., l. c. 268, 267, but is also in conflict with said decision of the Court of Appeals in said Leithauser case, 124 Fed. (2d) 117, and with the decision of this Court in 316 U. S. 663, and necessitates the issuance of the writ of certiorari in and of itself. This for the reason that the opinion of the District Judge in *Kithcart* v. *Metropolitan Life Ins. Co.*, 62 Fed. Supp. 93, is an incorrect opinion of

a Federal Court, circulating as the federal law of this country, to the detriment of litigants, and tending to cause the public to lose faith in their national courts.

The opinion of the Circuit Court of Appeals has a like effect since it states the basis on which the judgment was rendered and affirms it, especially in view of the fact that its opinion finds that no action for reformation accrued to petitioner for nearly four years after respondent delivered the policy to him. And, of course, such accrual could have been prevented only by respondent's fraud and petitioner's mistake.

In view of the fact that the conduct of respondents at the trial in May of 1933 is alleged to be merely an additional overt act, pursuant to the conspiracy alleged on page 23 of the record, it merely further operated to deceive petitioner as to Denison's authority and employment by respondent during June, 1929, and to further deceive petitioner as to respondent's knowledge that it had made a sound risk agreement as a part of its contract with petitioner.

Respondent's admissions in its brief in opposition to petition for certiorari establish that the judgments in the prior litigation are not *res judicata*.

The opinion of the Court of Appeals states:

> "The insured had brought suit in 1931 on the policy as it stood" (74).

Respondent agrees the first suit "was at law on the accident policy" (R. Br. 3). In 88 Fed. (2d) 407 it is declared that the first equity suit was a proceeding "in the nature of a bill of review" to set aside the judgment in the action at law for fraud (l. c. .....). 119 Fed. (2d) 497 holds that the second equity suit sought exactly the same

relief as the first, and that the judgment in the first was *res judicata,* and that, even had respondent's executive officers approved or signed the sound risk agreement, it would not be competent evidence; that it would be inadmissible if offered on the issues in the suit at law, all in accordance with the erroneous federal rule condemned in *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64.

The two actions for damages were dismissed, so there was no judgment.

Therefore, the claim in respondent's brief that the action at law based on the part of the contract described by the Court of Appeals as "the policy as it stood," and the two suits in equity to set aside the judgment on the policy as it stood, were based upon the same cause of action as this reformation suit, is untenable. Said statements from the opinions of the Court of Appeals refute respondent's contention as to its said claim.

Justice Holmes of this Court, in *Northern Assurance Company* v. *Grand View Building Association,* 203 U. S. 106, decided the exact question here involved and, since the opinion is short, we reproduce it:

> "This is a bill to reform a policy and recover upon it as reformed. An action at law upon the same instrument, between the same parties, has come before this court heretofore, 183 U. S. 308, 46 L. Ed. 213, 22 Sup. Ct. Rep. 133. In that case it was held that the plaintiff could not recover. The question before us at the present time is whether the Supreme Court of Nebraska failed to give full faith and credit to the judgment of the former case by holding that it was no bar to the relief now sought. (Neb.) 102 N. W. 246.
>
> "The policy was conditioned to be void in case of other insurance, unless otherwise provided by agreement indorsed or added; and it stated, in substance, that no officer or agent had power to waive the con-

dition except by such indorsement or addition. There was other insurance and there was no indorsement. The plaintiff alleged a waiver and an estoppel. The jury found that the agent who issued the policy had been informed on behalf of the insured and knew of the outstanding insurance. But this court held that the attempt to establish a waiver was an attempt to contradict the very words of the written contract, which gave notice that the condition was insisted upon and could be got rid of in only one way, which no agent had power to change. The judgment based upon this decision is what is now relied upon as a bar. *Metcalf* v. *Watertown,* 153 U. S. 671, 676, 38 L. Ed. 861, 863, 14 Sup. Ct. 947; *Hancock Nat. Bank* v. *Farnum,* 176 U. S. 640, 645, 44 L. Ed. 619, 621, 20 Sup. Ct. Rep. 506.

"Whether sufficient grounds were shown for the relief which was granted is a matter with which we have nothing to do. But the state court was right in its answer to the question before us. The former decision, of course, is not an adjudication that the contract cannot be reformed. It was rendered in an action at law, and only decided that the contract could not be recovered upon as it stood, or be helped out by any doctrine of the common law. If it were to be a bar it would be so, not on the ground of the adjudication as such, but on the ground of election, expressed by the form in which the plaintiff saw fit to sue. As an adjudication it simply establishes one of the propositions on which the plaintiff relies—that it cannot recover upon the contract as it stands. The supposed election is the source of the effect attributed to the judgment. If that depended on matter *in pais* it might be a question, at least, as was argued, whether such a case fell within either U. S. Const., Art. 4, Sec. 1, or Rev. Stat., Sec. 905, U. S. Comp. Stat. 1901, p. 677. It may be doubted whether the election must not at least necessarily appear on the face of the record as matter of law in order to give the judgment a standing under Rev. Stat., Sec. 905.

"We pass such doubts, because we are of opinion that, however the election be stated, it is not made out. The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in *Washburn* v. *Great Western Ins. Co.,* 114 Mass. 175, where this distinction was stated by Chief Justice Gray. Its choice of law was not an election, but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the Supreme Court of Nebraska and the Circuit Court of Appeals for the circuit. *Home F. Ins. Co.* v. *Wood,* 50 Neb. 381, 386, 69 N. W. 941; *Fireman's Fund Ins. Co.* v. *Norwood,* 16 C. C. A. 136, 32 U. S. App. 490, 69 Fed. 71. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could effect the same result. It did demand the result, and showed by its pleadings that the path which it did choose was chosen simply because it was supposed to be an open way. *Snow* v. *Alley,* 156 Mass. 193, 195, 30 N. E. 691.

"A question argued as to the obligation of the contract having been impaired by a statute as construed was not taken below, and is not open here.

"Decree affirmed."

The law as there declared was incorporated into the jurisprudence of Missouri in *Baumhoff* v. *Railroad,* 205 Mo. 248, l. c. 268:

"In getting at ultimate right it has been held that a suit for specific performance of a contract, dismissed on hearing on the merits, is not a bar to an action at law between the same parties to rescind the contract and recover back money paid under it. (*Ballou* v. *Billings,* 136 Mass. 307.) The judge writing that case, Oliver Wendell Holmes, later and now a

member of the U. S. Supreme Court, spoke for that court in an opinion in *Northern Assurance Co.* v. *Grand View Building Association,* 203 U. S. 106, holding that a suit at law to recover on an insurance policy, in which plaintiff was denied recovery as the policy stood, is not an adjudication that the contract of insurance cannot be reformed in an after suit in equity. The first suit had proceeded on the theory that a recovery could be had without reformation; and in disposing of the question of election, Justice Holmes epigramatically said: 'Its (plaintiff's) choice of law was not an election but an hypothesis'."

At l. c. 267 in said case, the Missouri court said:

> "Where the *cause* and *object* of both action are the same, the judgment in the prior bars the subsequent suit. When the cause or object of the actions are different, though the point in dispute is the same in both, the prior judgment is no bar to the subsequent action, but the verdict is matter of evidence to prove the point."

The purpose of the reformation suit is stated in the opinion of the Court of Appeals herein (75-76) as follows:

> "The purpose of the present action, in substance, is to have inserted in the policy, through reformation, a provision to the effect that it was agreed at the time the insurance was written (1) that the insured was then 'of sound mind, sound body, (and) good health'; (2) that the insurer had investigated and 'determined conclusively' that such was the fact; (3) that the insurer bound itself not to 'use any prior evidence to the contrary thereof in any legal proceedings'; (4) that the insurer was 'hereby estopped from all objection that any prior mental or bodily diseases or infirmity contributes to any future disability of the (insured) after said date'; and (5) that

> the fact that such a special provision was intended to be and had been made a part of the insurance contract should be 'sufficiently evidenced' by the mere delivery of the policy. The petition alleges that the provision had been drawn up between the insured and the insurer's agent and had been forwarded to the insurer's home office with the insured's application and that by the insurer's acceptance of the application and the issuance of the policy the provision had become a part of the actual contract even though it had been omitted from the language of the policy."

On page 22 of its brief, respondent admits that five separate and distinct issues were submitted to the jury in the action at law. Respondent then, proceeding upon the basis of its misstatement that the reformation suit and the action at law, and the suits to get relief from the judgment in the action at law are the same suit, made the following statement on said page 22 of its brief:

> "All these issues (the five above named by respondent (22)) were fully and painstakingly covered and submitted in the charge to the jury (61-77, 11880). The verdict was a *general verdict* (61, 11880). The suit was one upon this same policy for indemnity for the same alleged accident. A determination against plaintiff on *any one* of the above issues would have been (and is) conclusive against him as to *any* and all right of recovery. A *general verdict,* such as was rendered there, concludes *all issues* against the plaintiff." (Italics respondent's.)

If the preceding suits and the reformation suit were based on the same cause of action, the above statement would declare the applicable law. On page 32 of its brief respondent admits that the law, as thus stated, applies only to consecutive suits based on the same cause of action, thus:

> "The Missouri courts have long recognized the usual rules of *res adjudicata,* namely, that a judgment in a prior suit on the same cause of action is *res adjudicata* on all matters litigated and all matters which might have been litigated therein * * *"

and then, realizing that that rule does not help it and has no application, it sets out the rule and Missouri authorities applying it *where the subsequent suit is on a different cause of action* (italics ours) * * * by saying:

> "* * * and also that a prior judgment is *res judicata* as to matters actually litigated therein, *even in a subsequent suit on a different cause of action.*"

Why did respondent insert the latter rule as to *a different cause of action?* It says, in the preceding 32 pages of its brief, that the *reformation suit in equity* wherein petitioner seeks to have the court add the "sound risk" agreement to the "policy," thus reforming and putting together the *contract actually made by the parties* but through mistake of petitioner and fraud of respondent not attached to each other is the *same contract* as that involved in the *action at law,* which the Court of Appeals says was brought "on the policy as it stood" (74). This is admitted by respondent on page 3 of its brief for it says that the action was

> "* * * a suit at law by this petitioner as plaintiff against respondent on the accident policy in question."

The reason for the insertion of the rule by respondent, on page 33 of its brief, as to matters (not which *might have been* but *which were actually litigated*)

> "* * * *even in a subsequent suit on a different cause of action*" (italics ours)

is that it fully appreciates that a suit to reform a contract by attaching its separate parts together is a different suit from a mistaken suit to recover on one of the parts of the contract, and that a mistaken action at law on the part known as the policy is not *res judicata* on an issue as to whether that policy and the sound risk agreement should be attached by a decree in equity (203 U. S. 106). For issues in the suit on the policy did not include the issue requiring reformation.

The "subject matter" in the former suits was on "the policy as it stood" (74), while the subject matter of the reformation suit is the *actual contract as made.* That is, the policy and sound risk agreement.

> "The record of a former suit between the same parties is not conclusive unless the subject matter passed on in the former suit be the same with the dispute in the case at bar."
>
> (*Clemens* v. *Murphy,* 40 Mo. 121; *State* v. *James,* 82 Mo. 509.)

And so the law of Missouri, as declared by its Supreme Court as recently as November 5, 1945, in *In Re Brewer's Income Tax,* 190 S. W. (2d) 248, contradicts respondent's contention that

> "An adverse ruling on one of these issues (or certain others) would have forever foreclosed a recovery, and would render a 'reformation' wholly immaterial (R. Br. 23).

For respondent admits that it does not know which "issue" (of the above) was the basis of the general verdict. It preceded the above statement by the language:

> "The jury may have disbelieved the plaintiff entirely, finding that there was *no accident;* it may have

> found that he was *never disabled* within the meaning of the policy from any cause; it may have found that he had given *no sufficient notice* of accidental injury, which was one of the contested issues in the case." (Italics respondent's.)

In Re Brewer's Income Tax, supra, l. c. 250, pointed out that the judgment there, as here, was general

> "• • • while both the statute of limitations and nontaxibility of income were set up as defenses."

In other words, there were *two issues* and a *general judgment* in the Brewer case. Holding that the former judgment was not *res judicata,* the Supreme Court of Missouri in the Brewer case proceeds:

> "Where several distinct questions are presented by the pleadings, either of which might have been the basis of the judgment, and it does not appear upon which the judgment is based, the judgment is not conclusive when one of these questions is presented in a subsequent different suit based upon another separate and distinct transaction." 34 C. J. 922, Sec. 1330 American Law Institute Restatement of Judgments, p. 306; *State ex rel. Waters* v. *Hunter,* 98 Mo. 386, 11 S. W. 765; *American Paper Products Co.* v. *Aetna Life Ins. Co.,* 204 Mo. App. 527, 223 S. W. 820; *De Sallor* v. *Hanscome,* 158 U. S. 216, 15 S. Ct. 816, 39 L. Ed. 956. See, also, *State ex inf. McKittrick ex rel. City of Trenton* v. *Missouri Public Service Corp.,* 351 Mo. 961, 174 S. W. (2d) 871. That is the situation here."

In *Paper Products Co.* v. *Aetna Life Ins. Co., supra,* l. c. 536, it is said, quoting Mr. Justice Field of this Court:

"If it appears that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of the matter will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

l. c. 537:

"Where a judgment may have proceeded upon either or any two or more different and distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact, must show affirmatively that it went on that fact, or else the question is open for a new contention. * * *

"It is the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment (*De Sollar* v. *Hanscome*, 158 U. S. 216; *Callaway* v. *Irwin*, 123 Ga. 344). For these reasons the plea of former adjudication cannot be sustained."

The District Court, evidently following the discarded rule of *Swift* v. *Tyson*, 16 Pet. 1, as to questions of general law, refused to follow the law of Missouri in accordance with its duty as declared in *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. But even the rule of *Swift* v. *Tyson* did not justify its ruling, for this Court in the De Sollar case recognized the same rule as the Missouri courts.

The Court of Appeals, though the question was duly presented by petitioner, approved of said judgment by failing to reverse it.

So that both lower courts, as to this question, denied petitioner the benefit of Section 34, or 725 U. S. C. A. Tit. 28, and ruled that he was not entitled to its protection.

This both lower courts were without jurisdiction to do under the command of said statute, as pointed in both *Swift* v. *Tyson,* 16 Pet. 1, and *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, and the countless cases following same. The judgments of the lower courts so palpably exceeded their jurisdiction that petitioner in his brief in support (p. 38) called this Court's attention to Section 377, Tit. 28 U. S. C. A., as a section enabling this Court to exercise its appellate jurisdiction included in Section 347, in the event it found that Section 347 did not authorize it so to do.

The removal to the federal court enabled respondent to escape being bound by its waiver and estoppel agreements, and it did so by invoking the rule of general law then applied in the federal courts under the heresy of *Swift* v. *Tyson,* to the effect that a waiver cannot be shown in the federal court on any kind of contract unless it be pleaded. And in any event, even if pleaded, it could not be shown in the action at law in the federal court, *Leithauser* v. *Hartford Fire Ins. Co.,* 78 Fed. (2d) 320.

But respondent, fully appreciating that under the law of Missouri, as declared by this Court and U. S. Supreme Court, the judgment in the action at law is not *res judicata,* seeks to claim that the two suits in equity reported in 88 Fed. (2d) 407 and 119 Fed. (2d) 497 are *res judicata.* On page 24 of its brief it makes the incorrect statement:

> "In the first equity suit it was alleged that such agreements were *oral;* in the second, it was claimed for the first time (in 1940) that they were contained in *written documents,* elaborately described." (Italics respondent's.)

But the first equity petition alleged concealment of records, thus establishing that the waivers were in writing.

On page 24 of its brief, respondent says:

> "In the prior equity suits plaintiff alleged * * * the defendant * * * waived all prior defects * * * the net result in each such case was that the plaintiff claimed and alleged a waiver * * * of all prior defects."

In said brief respondent admits that the subject matter in the previous suits was only the waiver of prior evidence of unsoundness in breach of Clause 9 of the policy. The respondent's own admission proves petitioner now has a different cause of action.

But from page 20 of the abstract of petitioner's petition in the reformation suit it appears that it is based on the question as to whether or not respondent waived attachment of the sound risk agreement to the policy, and thereby prevented itself from availing itself of the alleged breach of provision 2 by its agreement made before the delivery of the policy, that the sound risk agreement did not need to be attached thereto; and as to the misrepresentation made with reference to the federal law, under which federal law it became necessary to have said sound risk agreement attached to the said policy.

The said representation was correct as to the law of the State of Missouri, and it became false only by reason of the fact of removal of the action at law to the federal court, which enabled respondent to invoke the protection of the federal law, and deprived petitioner of the protection of the Missouri law.

It appears from the petition in the first equity suit that the alleged waiver referred to therein was a waiver of the mental disease of Clause 9 of the policy. Petitioner's petition, as above quoted, thus declared that the alleged waiver was a waiver of a different clause of the policy, from standard provision 2, which the opinion of the Court of Appeals expressly states is the basis of the reformation

suit. This is shown by the following from page 76 of the record:

> "The reason given for the present attempted reformation is that the insured has been denied the right in his previous litigation to make proof of this special provision as part of his contract, in view of the clause in the policy that 'no change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed hereon'."

In *Boyce* v. *Christy*, 47 Mo. 70, the law is thus stated:

> "When the petition in an action on a special contract contains several independent counts, alleging various breaches, the investigation of which involves separate inquiries and findings, such breaches should be held to be independent causes of action, notwithstanding they arose on the same contract."

On pages 29 and 30 of its brief in opposition, the respondent said:

> "The so-called 'reformation' which plaintiff seeks would not be a reformation of the policy at all. It would, in substance, change an accident policy (strictly limited to such) to a general health policy covering disability from practically any cause."

Such attachment of the sound risk agreement to the policy would not extend the coverage of the policy to any other cause of disability which happened after delivery of the policy, but would only make the contract serve its mutually intended purpose of insuring the petitioner as a sound risk on the date of application on June 14, 1929.

II.

The fact that the Court of Appeals found that the action for reformation did not accrue on the date of delivery of the policy on June 25, 1929, and found that under the Missouri law if the failure to attach the sound risk agreement was due to mistake only said action would accrue on said date, established that the said court found that respondent's fraud had prevented such accrual for the ensuing four years. And consequently the fact that respondent continued this fraud by its conduct at the trial in further misrepresenting the facts to petitioner and the court, instead of making the action for reformation accrue, prevented petitioner from having the knowledge of respondent's knowledge of the sound risk agreement until February 25, 1939, when the action for reformation was caused to accrue by the knowledge petitioner then obtained as shown by affidavits on file in this Court in Cause 789, October term, 1941.

The Court of Appeals, as shown by its opinion, acted in excess of its jurisdiction and beyond same, in that it failed to give effect to Section 34 of the Act of Congress of 1789, now Section 725, Title 28 U. S. C. A., commanding that:

> "Sec. 725. Laws of States as rules of decision. The laws of the several States, except where the Constitution, treatries, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply,"

in that it failed to give to petitioner the benefit of Sections 1012, 1013 and 1031, R. S. Mo. 1939, which prevented the action for reformation from accruing under the facts, until on or after February 25, 1939. Section 1012 is the first section of Article IX of Chapter 6, R. S. Mo. 1939, and is the basic provision of the 30 sections in said Article

IX, which deal with limitations of personal actions. Said Section 1012 is as follows:

> "Sec. 1012. Period of limitation prescribed.
> Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: *Provided,* that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

Said proviso was added in 1919.

Said section must be construed in connection with Section 1031, which is as follows:

> "Sec. 1031. Limitation not to be extended by improper acts of defendant.
> If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."

Both of said sections must be construed in connection with Section 1013, which is as follows:

> "Sec. 1013. What actions shall be commenced within ten years.
> Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of con-

veyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of action shall accrue; third, actions for relief, not herein otherwise provided for."

The opinion of the Court of Appeals points out that Section 1013 provides the general limitation on suits for reformation in Missouri, and limits such suit to 10 years. The opinion then says (77):

> "*Stark* v. *Zehnder*, 204 Mo. 442, 102 S. W. 992, 994. In cases of mistake or of omissions not due to fraud, the reformation right ordinarily is deemed to have accrued *at the time the mistake or omission occurred. Hoester* v. *Sammelmann, supra; Stark* v. *Zehnder, supra.* But even if the situation is one where the statute may not previously have commenced to run, the denial of a known right or status upon an assertion of it clearly will put the statute in operation. Cf. *Carlin* v. *Bacon*, 322 Mo. 435, 16 S. W. (2d) 46, 48, 69 A. L. R. 1."

The Court of Appeals correctly declares the applicable Missouri law when it says that

> "* * * the denial of a known right or status upon an assertion of it will clearly put the statute in operation" (77).

But why did the Court of Appeals not apply the principle stated by it that (77):

> "* * * the reformation right ordinarily is deemed to have accrued at the time the mistake or omission occurred."

It is evident that it appears from the opinion of the Court of Appeals and its finding that respondent's fraud prevented the accrual of the right to have the policy reformed. In other words, mere mistake on June 25, 1929, could not prevent its instant accrual nor postpone its accrual until May, 1933.

It thus appears from the opinion, in connection with the petitioner's petition, that the Court of Appeals found that the respondent was guilty of fraud which prevented the action from accruing before the trial of the lawsuit in May, 1933. In other words, the finding by the Court of Appeals is that the respondent's fraud prevented the action for reformation from accruing for nearly four years after petitioner received the policy. But the Court of Appeals finds that when the respondent supplemented its overt acts of fraud, pursuant to the conspiracy alleged by petitioner (16, 17, 23), by grosser acts of fraud at the trial of the case, which further prevented petitioner from bringing his suit for reformation, that these gross acts of themselves caused the accrual of the cause of action.

We direct attention to the fact that before the trial and after respondent made the same misrepresentations to petitioner as made at the trial, the said respondent had lulled the petitioner into security and prevented the bringing of the reformation suit (16, 17). The record (15-16) shows:

> "On June 25, 1929, R. G. Danison represented that he was not employed by the defendant on June 14 and 25, 1929, but was then only employed by the debit agent, M. E. Marquis, was then only assisting M. E. Marquis, and that he (Denison) had no authority to sell any policy for defendant, but was selling it for M. E. Marquis, who was defendant's authorized agent, and not selling it himself as assistant manager for defendant. On June 14 and 25, 1929, R. G. Deni-

son represented that M. E. Marquis was not a witness to any part of said application, waivers and estoppels, or signatures of executive officers (fol. 14) thereon, and that defendant did not allow M. E. Marquis to discuss the defendant's private business or correspondence and that M. E. Marquis would not answer any such question if plaintiff asked him any questions about said application and documents contained therein, and M. E. Marquis did not answer any such questions until after February 25, 1939.

"That thereafter, on April 30, 1930, V. D. Marshall and W. L. Magoon represented to plaintiff that they could not remember that R. G. Denison worked for defendant on June 14, 1929, but that they did remember he no longer worked for defendant at said time, and that they did not know which city R. G. Denison had gone to after leaving Kansas City, and that they did not know what he did with said documents of application and waivers or estoppels.

"On October 31, 1931, May 13, 1935, April 23, 1938, and on May 9, 1938, said V. D. Marshall and W. L. Magoon both represented to plaintiff that they could not remember of said application or documents of waiver or estoppel, and that they could not remember of anyone else having said documents in possession of defendant, when on all said dates plaintiff requested the same.

"On February 25, 1939, V. D. Marshall represented to plaintiff that the photostatic application alone as signed by M. E. Marquis was the only application which he could remember in defendant's possession, and was the only one which he could furnish to plaintiff on said date, same being Exhibit 'C'."

The Court of Appeals wholly overlooked the said allegations in its opinion, for, had it read and understood said allegations, it would have known that the fraud which it found prevented the action from accruing before the

trial, also prevented the action from accruing until February 25, 1939.

Furthermore, the Court overlooked the allegation on page 7 that

> "* * * defendant claimed that said copy of the record of said army discharge was procured from the Government pursuant to a 'hunch' of defendant's trial counsel."

It thus appears that respondent not only prevented petitioner from having knowledge that respondent had knowledge of the sound risk agreement later discovered by petitioner after February 25, 1939, to have been executed by the respondent, but it also prevented its own trial counsel from having any knowledge thereof.

Petitioner had no knowledge (16, 17) of any kind that respondent had the knowledge above mentioned which would bind it to the sound risk agreement or make it responsible for the fraud of Denison in negotiation thereof before February 15, 1939.

Petitioner did not know that said written documents were in respondent's possession, because respondent denied all knowledge or possession thereof (16, 17), as above stated, and because petitioner had not seen the signature of any agent of respondent on the sound risk agreement when his signature was appended thereto on June 14, 1929 (9, 10, 11).

Petitioner did not yet know, on February 25, 1939, that the sound risk agreement was in possession of respondent when the application, Exhibit "C" (35), was furnished to him on said date, because the sound risk agreement had been detached therefrom (18). The sound risk agreement, bearing the signatures of executive officers, had not been delivered to petitioner on June 25, 1929 (11).

It further appears that at all times after June 25, 1929, when petitioner asked for a copy of the sound risk agreement, respondent denied all knowledge of possession thereof (7, 16).

It appears that Denison's and petitioner's signatures were both absent from the copy of the application attached to the policy (22, B 33). And, furthermore, the sound risk agreement was signed only by petitioner on June 14, 1929 (10).

The court overlooked the allegation on page 9 of said petition,

> "* * * that it was not until February, 1939, that he could and did discover evidence which had been concealed by defendant, that said agents had signed and approved the following documents and that the defendant's Home Office had received from its agents before delivery of said policy, the following documents, to-wit:"

which included the sound risk agreement.

It appears from the record that petitioner could not discover, from any ruling of any court or any objections made by respondent, that said sound risk agreement was executed, because it was not attached to the policy, because the only objection made and the only ruling of the court was upon the absence of the signatures of agents of respondent (9, 10, 11, 18, 21).

The Court of Appeals overlooked the fact that the petition shows the absence of signatures of any agent of the respondent from said sound risk agreement (9, 10, 11, 21). It nowhere appears in any record that the respondent made any objection, or the court made any ruling at the time of the trial in 1933, that this sound risk agreement was not admissible because it was not attached to the policy.

Petitioner could not discover from the opinion of the Court of Appeals, 88 Fed. (2d) 407, that the sound risk agreement should be attached to the policy, for the court's opinion only revealed that the respondent was not bound by the conversation of a mere soliciting agent.

Petitioner could not discover from the tort suits, dismissed in 1938, anything, because the court did not pass on anything.

The first opportunity for the petitioner to infer that the sound risk agreement must be attached to the policy was from the court opinion in the second equity suit, 119 Fed. (2d) 497, in 1940, 1941, 1942, that the sound risk agreement, even if signed by executive officers, even if produced in evidence by respondent, was not competent evidence in any legal proceeding on the policy as it stood (14, 22).

No court has ever passed on the question of whether the sound risk agreement should be attached to the policy.

Petitioner's belief that respondent had knowledge of the sound risk agreement by holding it in trust, by the false representations of Denison that respondent was holding the sound risk agreement in trust (15), was extinguished by the false representations of Denison and Marshall before the trial in 1933, as alleged on (16, 17). And the misrepresentations to the court at the trial, by respondent itself through counsel and by its witnesses Magoon and Marshall under oath, that they had no knowledge or possession of the sound risk agreement (16, 17), and by the fact that Denison was not present, it was not possible to examine him as to the truth of his representations about respondent's knowledge or possession of said sound risk agreement (21).

Petitioner relied upon and was misled by the testimony of respondent's district manager, under oath, when, dur-

ing the absence from the trial of Denison, he denied that Denison was in respondent's employ at the time of the making of the contract in June, 1929 (16, 17).

Respondent in its brief asserts that the above facts show that petitioner's claim that he was prevented from bringing the reformation action, was based upon lack of evidence, and not on lack of knowledge. (See respondent's brief, page 16.) It there says:

> "The allegations of supposed continuations of the fraud since 1933, of concealments, of 'discoveries,' etc., do not change the picture in any way; at most they relate to matters of *evidence,* not of *knowledge,* for plaintiff's knowledge was complete in 1933, including knowledge of the *claimed* intention of defendant to defraud him." (Italics respondent's.)

The above and foregoing demonstrates that said statement by respondent is in direct conflict with the record in this case. It was by such statement that respondent misled the Court of Appeals and perhaps this Court, and also demonstrates that respondent fully recognizes the truth that the said absence of knowledge, under the statutes of the State of Missouri, prevented the accrual of the cause of action under the proviso of Section 1012 specifically declaring that

> "* * * the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment."

Furthermore, the lack of knowledge by the petitioner was a direct consequence of the improper acts above set forth of the said respondent (16, 17, 11, 9), which operated, under Section 1031, R. S. Mo. 1939, to toll the

statute of limitations, to-wit: Section 1013, and not Section 1014, which had no application to this reformation suit founded as it was on contract and not on fraud as stated by the Court of Appeals.

The representations of Denison, with reference to the applicable law concerning waiver of attachment (20), was true with reference to the law of the State of Missouri, as shown by the following decisions: *Stephens* v. *German Ins. Co.*, 61 Mo. App. 194; *McCulloch* v. *Phoenix Ins.*, 113 Mo. 606; *Andrews* v. *Fidelity Ins. Co.*, 168 Mo. 151; *Langford* v. *Ins. Co.*, 97 Mo. App. 79; *Rickey* v. *German Grantee Town Mut.*, 79 Mo. App. 485.

As pointed out by this Court in *Erie* v. *Tompkins*, 304 U. S. 64, and by the dissenting opinion of Justice Field in *Railway* v. *Baugh*, 149 U. S. 391, 411, the federal court was without jurisdiction to destroy the obligation assumed by respondent in its contract with petitioner.

But by the denial of the petition for certiorari, if such denial stands, then we have a situation wherein petitioner has been denied the benefit, not only of the privileges and immunities clause of the XIVth Amendment, but also of the due process and equal protection provisions of Section 1 of said Amendment; and also by the act of the said court in obeying the Act of Congress authorizing removal to the Federal Court, respondent was enabled to avoid the obligation of its contract under Missouri law.

The Missouri Supreme Court in *Missouri Sav. Bank* v. *Kellems*, 321 Mo. 1, *et seq.*, has ruled that in the situation of petitioner and his relationship to Denison, under the facts made Denison's misrepresentations (20) as to the Missouri law binding on the respondent. And this applied to the law of both Missouri and the law as applied by the federal courts in June, 1929. The fact that the representa-

tion made was true as to the Missouri law, and false as to the then federal law, enabled respondent to defraud petitioner.

But nevertheless, said misrepresentations (20) do not operate to prevent petitioner from having the contract reformed by attaching the sound risk agreement to the policy. On the contrary, such representations in this case establish petitioner's right to reformation.

Since under the Missouri law as found by the Circuit Court of Appeals in its opinion (77), the cause of action for reformation accrued on delivery of the policy on June 29, 1925, unless by reason of respondent's fraud and petitioner's mistake it did not then accrue. And, since the Court of Appeals has found that it did not then accrue, then, before it could find that it accrued at the time of or as a result of the trial of the action at law, it would be necessary for the court to find that petitioner then acquiesced or assented to respondent's fraud. For, in Bispham on Equity, 10 Ed., Sec. 203, p. 345, the principle applicable to this case has been thus stated:

> "The principle may be said to be that where actual fraud is proven, the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. Indeed, in a case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."

The law as thus stated is supported by the following decisions of this Court, cited by the author:

> "*Saxlehner* v. *Eisner & Mendelsohn Co.*, 179 U. S. 39; *McIntire* v. *Pryor*, 173 U. S. 38; *McLean* v. *Fleming*, 96 U. S. 245; *Menendez* v. *Holt*, 128 U. S. 514; *Portuondo Cigar Co.* v. *Cigar Co.*, 222 Pa. 116."

The Missouri appellate court, applying its limitation law, cited some of the above decisions of this Court in *Gaines & Co.* v. *Whyte Grocery Co.*, 107 Mo. App. 507, at l. c. 526, said:

> "In *McIntire* v. *Pryor*, 173 U. S. 38, it was in effect held that the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to a plaintiff's claim. The cases analyzed in that opinion make it plain that where actual fraud is shown the court will look with much indulgence upon the circumstances tending to excuse the plaintiff from a prompt assertion of his rights. And in a case of active and continuing fraud it should be satisfied with no evidence of laches that does not amount to proof of assent or acquiescence."

McBeth v. *Craddock*, 28 Mo. App. 380, says:

> "When one by his statements purposely induces another to rely on their truth and forego other sources of information, he cannot escape liability by then suggesting further inquiry."

Scott v. *Haynes*, 12 Mo. App. 596, says:

> "(7) The plaintiff's failure to avail himself of means of knowledge within his reach will not relieve the defendant of his liability, if his representations were intended and did influence the plaintiff not to make inquiry."

The Court of Appeals overlooked the consideration that petitioner's petition alleges a conspiracy to defraud him (23), and also alleges that all of the said acts, including the acts of the respondents at the trial of the action at law, were overt acts pursuant to the conspiracy to defraud.

The singular result is that the Court of Appeals has found that the overt acts of the respondent at the trial of the lawsuit operated to relieve the petitioner from liability instead of clinching its liability to petitioner.

As pointed out by the House of Lords in *Quinn* v. *Leathem*, A. C. 495, with reference to this kind of case:

> "The overt acts which follow a conspiracy form of themselves no part of the conspiracy. * * * they are only things done to carry out the illicit agreement already formed and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished."

The conspiracy is an act in itself, and the overt acts pursuant to the said act of conspiracy continued until the institution of this suit. And, under the law as declared by the Supreme Court of Missouri in *Ruckels* v. *Pryor*, 351 Mo. 819, the conspiracy herein involved was a continuing conspiracy, in which situation the statute of limitations can never apply, as shown by the following language at l. c. 846 from said report:

> " 'The defendants were indicted for setting fire to a certain stock of merchandise for the purpose of securing the insurance thereon. There was evidence of a conspiracy to thus fraudulently obtain the money from the insurance company. But it was urged that the conspiracy ended when the fire took place, as there was no evidence that any attempt was made to collect the insurance money. But the court held that

the conspiracy continued, and was not ended until the insurance money was collected, and there was no evidence tending to show that the purpose of the defendants to obtain the money was abandoned. In other words, the conspiracy to defraud having been established, it will be presumed to continue, and not to be abandoned until its purpose is accomplished.

"'Where the existence of a certain condition or state of affairs of a continuous nature is shown, the general presumption arises that such condition or state continues to exist, until the contrary is shown by either direct or circumstantial evidence, so long as is usual with conditions or things of that particular nature'."

Why did the Court of Appeals ignore the law thus disclosed and, on the contrary, forfeit petitioner's rights under his insurance contract?

III.

The Court of Appeals, notwithstanding its opinion, discloses a finding that respondent's fraud prevented the accrual of the reformation action for four years, yet of its own initiative forfeited and declared a forfeiture of petitioner's rights under the contract which the Court of Appeals found had been alleged to have been made by the parties. Said court was without jurisdiction so to do under the decision of this Court in *Erie Ry.* v. *Tompkins*, 304 U. S. 64, and under law of Missouri. In the leading case of *Shearlock* v. *Ins. Co.*, 193 Mo. App. 430, it was held that a suit on a policy of insurance 17 years after the death of insured was not barred by the statute of limitations. Treating said *statute of limitations* and lack of proof of death, the court said:

> "*Such defenses are generally termed forfeitures;* that is, the plaintiff forfeits his cause of action (or as defendant claims, does not bring it into being) by failure to furnish proofs of loss *or to bring his suit within a certain time.* Forfeitures are not favorites of the law, *and especially of the insurance law.*"

That language is a mere recitation of the time-honored rule as to insurance contracts applied in Missouri. In *Mathews* v. *Modern Woodmen,* 236 Mo. 326, l. c. 342, Judge Lamm said:

> "Again, forfeitures are not favored by the law. *Courts never go out of their way to find them,* but will enforce them when plainly set forth and there can be no two ways about it. They will not be allowed if ambiguities can be fairly resolved against them. Speaking of insurance contracts, it is a just and settled rule that their restrictive terms shall be taken most strongly against the insurer. The doctrine of *contra proferentum* is strictly applied with unaccommodating vigor, and, as said, ambiguities are blandly resolved in favor of the insured. So that, if the contract in suit is open to two constructions, one favorable to the insured and one not, if the insured has acted on the favorable construction, courts will take his view of the contract—being always mindful that the principal obligation (the very life and soul) of a policy is to pay the policy face when the contingency or event happens upon which payment is predicated."

If such rule will be applied to prevent a forfeiture because of "double talk" in an insurance policy, what rule should have governed the Court of Appeals in construing the misrepresentations set forth at great length in the petitioner's pleading? These misrepresentations were found by said court to prevent the accrual of the cause of action for reformation for four years. By what

authority or method of reasoning did it permit itself to conclude that misrepresentations at the trial, to-wit: That respondent had no knowledge of the sound risk agreement which would bind it thereto nor knowledge of Denison's authority which would make it responsible for his fraud in the negotiation of the sound risk agreement? The author of the opinion was formerly a Nebraska lawyer. This explains his failure to give effect to the Missouri law above quoted and caused said Court of Appeals to go out of its way to find a ground on which to forfeit petitioner's rights in his insurance contract. Since neither pleadings nor brief referred to Section 1014, R. S. Mo. 1939, it is manifest that said court went out of its way to find same and to apply it to petitioner's action on contract when it could only be applied to an action on tort by virtue of its own language. The Act of Congress (June 19, 1934, c. 651, § 148, Stat. 1064) authorizing this Court to prescribe rules for the District Courts, declared that:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

The Court of Appeals cited *Guaranty Trust Co.* v. *York,* 89 L. Ed. 1418, in support of its going out of its way to find a Missouri statute of limitation which had never before been applied by a Missouri court to an action on contract because it never applied to such a contract, but only to actions grounded on fraud. The fact that respondent fraudulently concealed its knowledge of the contract which bound it thereto and its knowledge of Denison's authority and acts did not make the reformation suit to reform the contract an action grounded on fraud within the meaning of Section 1014, R. S. Mo. 1939. And so the Court of Appeals by forfeiting petitioner's insurance contract as it did, contrary to Missouri

law, ran counter to the law as stated in *Guaranty Trust Co.* v. *York, supra,* l. c. 1424, when it said:

> "The nub of the policy that underlies *Erie Ry. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of a state court a block away should not lead to a substantially different result."

The fact that the amended petition (which we did not write) was found by Judge Otis to have been inexpertly drawn, did not justify the decisions of the lower courts against petitioner under the rule recognized by all courts, including this, as illustrated by its decision in *Pyle* v. *Kansas,* 317 U. S. 213-216:

> "Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. * * * In view of petitioner's inexpert draftsmanship, we, of course, do not foreclose any procedure designed to achieve more particularity in petitioner's allegations and assertions."

The decisions of the federal courts in petitioner's litigation are in direct conflict with the law of Missouri, and are based on the heresy of *Swift* v. *Tyson,* 17 Peters 1.

But yet, nevertheless, under decisions of this Court in *United States* v. *Peters,* 5 Cranch 115, the state court in which the reformation suit was filed could not reform the insurance contract without reference to the said

judgments of this Court. This makes it necessary for even a Missouri court to reform the contract.

How such good judges as Judge Otis and those of the Circuit Court of Appeals are known to be could render such decisions and write such opinions, in direct conflict with the above opinions of this Court, the Supreme Court of Missouri, and that of the United States Circuit Court of Appeals for the Sixth Circuit, is hard to explain.

Said opinions should not be permitted to remain as the purported law of this Nation.

If ever a case of conflict necessitated the issuance of the writ of certiorari, this is the case.

Because of the conflicts between the opinions and decisions of the United States Court of Appeals and District Court and this and the Missouri Appellate Courts in the cases heretofore referred to, we most respectfully submit that a rehearing and the writ sought should be granted.

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